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No. 06-1078

Supreme Court, U.S.
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In The Supreme Court of the United States

DÉJÀ VU OF NASHVILLE, INC., a Tennessee corporation, and MERONEY ENTERTAINMENT, INC., a Tennessee corporation,

Petitioners,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

FRANCIS H. YOUNG
Counsel of Record
METROPOLITAN GOVERNMENT
OF NASHVILLE AND
DAVIDSON COUNTY
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341
Attorney for the Metropolitan Government

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Since Petitioners received abundant discovery regarding the evidence supporting the enactment of Chapter 6.54, is the fact that Petitioners were denied discovery into the motives of local legislators an issue worthy of this Court's review?

2. Is it necessary for this Court to re-visit the well-established law governing the degree of deference to be afforded municipalities when they enact ordinances targeting the deleterious secondary effects of adult businesses?

3. Since Petitioners were ordered to put all their constitutional challenges to Chapter 6.54 into their "second" injunction motion, can they now be heard to claim they did not raise certain other challenges as a "litigation tactic?"

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STATEMENT OF THE CASE

The facts and procedural history of the case are set forth in the two Sixth Circuit opinions, *Déjà vu of Nashville, Inc. v. Metropolitan Government*, 274 F.3d 377 (6th Cir. 2001) (Déjà vu App. 30-77) and *Déjà vu of Nashville, Inc. v. Metropolitan Government*, 466 F.3d 391 (6th Cir. 2006) (Déjà vu App. 1-15). Respondent adopts these portions of these decisions herein.

This case was tried in the District Court from April 13-15, 1999. (Déjà vu App. 152).[1] Petitioners called twelve witnesses and introduced twenty-five exhibits.

At the hearing on April 15, 1999, the Metropolitan Government introduced as Defendant's Exhibit 1 a one-and-a-half-inch thick compilation of documents which were placed before each member of the Metropolitan Council when it considered the ordinance which became Chapter 6.54. Included in this compilation of documents were: "secondary effects" studies from other jurisdictions; information on sexually transmitted diseases; "secondary effects" data from the Nashville Police Department; "secondary effects" data from the Nashville Health Department; examples of photos of booths in adult entertainment establishments; Chattanooga's adult entertainment licensing ordinance; and copies of various court decisions dealing with the well-documented secondary effects of adult businesses. Déjà vu App. 159-161; App. 1-7. Petitioners did

[1] At this page number in the Déjà vu appendix, the District Court indicates the last day of the hearing was on April 16, 1999, when in fact the proceedings concluded on April 15, 1999.

not object to this "secondary effects" evidence being introduced. App. 16.[2]

Petitioners themselves introduced a copy of the ordinance which became Chapter 6.54 as an exhibit during the hearing on April 13, 1999. Déjà vu App. 226. In addition to the eight "Whereas" clauses in the preamble describing the reasons for enacting the ordinance, there are a "Purpose" section and a "Findings" section. The "Findings" section includes thirty-two separate paragraphs of legislative findings of the Metropolitan Council which support the enactment of the ordinance. *Id.* at 226-36.

One of Déjà vu's twelve witnesses was Daniel Linz, an "experimental psychologist," or a "research social psychologist." App. 22. Dr. Linz has written an article with Déjà vu's counsel attempting to repudiate the concept of secondary effects of adult businesses. *See* Paul, Linz, Shafer, *Government Regulation of "Adult" Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 Comm. L. & Pol'y 355 (2001). Dr. Linz frequently testifies in court for adult businesses for the purpose of challenging the studies which establish the adverse secondary effects of those businesses. *See G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631, 635-36 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004); *Abiline Retail # 30, Inc. v. Bd. Of Commr's of Dickson Co. Kansas,* 402 F. Supp. 2d 1285, 1283, 1292 (D. Kan. 2005); *Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094, 1108 (S.D.

[2] Petitioners were provided with multiple copies of this evidence seven months prior, on September 18, 1998, when they were served with Respondent's answers to interrogatories and responses to requests for production of documents. App. 11-19.

Cal. 2005); *New Albany DVD, L.L.C. v. City of New Albany, Indiana*, 362 F. Supp. 2d 1015, 1020 (S.D. Ind. 2005).

Despite introducing three full days' worth of proof in the District Court, Petitioners now claim they were reserving the issue of "secondary effects" to litigate later, as a litigation tactic. However, Petitioners knew full well they were ordered to raise all of their constitutional challenges to the ordinance in their second injunction motion. There are at least five places in the record of this case where Petitioners or the courts recognize that Petitioners had to put all their constitutional challenges to Chapter 6.54 into their second injunction motion. They are:

- Magistrate Judge Griffin's October 30, 1998 Order in which she orders that in the potential upcoming (second) injunction motion plaintiffs will raise "all issues upon which the plaintiffs relies (sic) in this case." (Déjà vu App. 129).

- The Sixth Circuit's recognition that Petitioners "rais[ed] all their constitutional challenges to the Ordinance" in their second injunction motion. *Déjà vu of Nashville, Inc.*, 274 F.3d at 386 (Déjà vu App. 34).

- Petitioners' own acknowledgement in their Motion for Review of Magistrate Judge Griffin's Protective Order that they knew they were required to raise "the constitutional challenges to **all** of the other areas of the ordinance in question . . . which Plaintiffs contend are constitutionally infirm." (Emphasis added) (App. 26).

- Petitioners' own acknowledgement in the second injunction motion itself that "[p]laintiffs

> are required to raise here 'all' constitutional issues upon which they assert serve as bases for further enjoining the ordinance." (App. 32).
>
> - The Sixth Circuit's October 12, 2006 opinion in which the court stated that the District Court "addressed what appears to be all of Déjà vu's challenges to the Ordinance, leaving no unresolved issues of fact that would necessitate a trial." *Déjà vu of Nashville, Inc.*, 466 F. 3d at 398 (Déjà vu App. 13).

These repeated acknowledgements of the all-inclusiveness of Petitioners' second injunction motion show that all parties and the courts knew that Petitioners had to shoot all the arrows in their quiver in their second injunction motion. Otherwise, Petitioners would be able to raise constitutional issues one by one, thus prolonging this litigation forever.

A number of misstatements in Petitioners' Statement of the Case must be corrected. First, there is no requirement that a business owner license applicant or an entertainer permit applicant must appear in public before the Sexually Oriented Business Licensing Board ("the Board"), as Petitioners state on page 3 of the Petition. The application process in Chapter 6.54 does not contemplate a mandatory personal appearance before the Board. (*See* Déjà vu App. 304-316 for business licenses; Déjà vu App. 322-330 for entertainer permits). In fact, if the Board declines to issue either a license or a permit, the applicant may immediately appeal such denial to the Circuit or Chancery Courts of Davidson County. (Déjà vu App. 314, 328). No personal appearance before the Board is required.

Petitioners also provide a lengthy description of administrative proceedings before the Board in 1999 surrounding Déjà vu's initial license application. Petition,

at 6-7. Presumably, Petitioners are trying to show that the Board allegedly acts as a "censorship board" capable of denying adult entertainment licenses and permits on a whim. The inclusion of a transcript of an April 27, 1999 Board meeting (Déjà vu App. 390) is completely misleading, since from the transcript it appears Déjà vu never received a license in 1999. Déjà vu App. 392. In fact, Déjà vu requested an evidentiary hearing after the initial denial of its license, and it was in fact issued a license less than one month later, on May 26, 1999. Déjà vu App. 420.

In any event, this is completely irrelevant to the issues raised in the petition. The actions of a different Board eight years ago – prior to a lengthy period where Chapter 6.54 was not enforced at all – have no bearing on how Chapter 6.54 is being enforced today. In fact, both Petitioners – Déjà vu and Ken's Gold Club (the trade name under which Meroney Entertainment, Inc., operates (Déjà vu App. 352)) – received their sexually oriented business licenses at the newly reconstituted Board's meeting on December 28, 2005 and have operated continuously under them since that date. (*See* minutes of Board's December 28, 2005 meeting, App. 36-37).[3]

[3] The District Court's April 27, 2005 Order dissolving the injunction did not take effect until August 1, 2005, by its terms. Déjà vu App. 207. The government requested this delay to allow time for the Mayor to appoint new Board members, for the Board to hire an inspector, and for the creation of the forms to use in administering Chapter 6.54. The first Board meeting at which fully completed license applications were considered was the December 28, 2005 meeting, at which eleven licenses were approved, including those requested by Petitioners. App. 36-37.

SUMMARY OF ARGUMENT

The lower courts have no difficulty judging the constitutionality of adult business regulations under the principles set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). The courts are not troubled by the *Renton* rule that municipalities may reasonably rely on the experiences of other cities, and that empirical data of local adult businesses' "secondary effects" is not required to justify ordinances regulating such businesses.

The courts give municipalities great deference in experimenting with solutions to reduce the "secondary effects" of adult businesses. Since *Renton*, it has been – and continues to be – difficult for such businesses to persuade courts to override legislative judgments regarding how best to control such secondary effects. Petitioners' complaint about being deprived of discovery in this case is really an expression of their dissatisfaction with the deference the courts afford municipalities on this issue. In fact, in this case, Petitioners received an abundance of discovery, through receiving copies of the evidence upon which the Metropolitan Council relied in enacting Chapter 6.54 and videotapes of Council meetings. Petitioners also took four depositions of Metropolitan Government officials on topics of Petitioners' choosing.

Finally, this is not the first time that a Deja vu entity has argued for certiorari to this Court based on purported confusion among the lower courts due to this Court's "highly-fractured" opinions in *Alameda Books, Erie and Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). However, as this Court determined that certiorari was **not**

appropriate in *Déjà vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777 (6th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1023 (2006) (Supreme Court no. 05-374), neither should certiorari be granted here. The lower courts have no difficulty applying *Renton* and its progeny to determine whether adult business regulations violate the First Amendment. Petitioners are simply unhappy with the results of that application and they would prefer a new rule.

Certiorari should be denied.

REASONS FOR DENYING REVIEW

I. PETITIONERS' PREMISE – THAT THIS COURT'S DECISIONS REGULATING ADULT BUSINESSES ARE "HIGHLY-FRACTURED" – IS INCORRECT. THEIR CONCLUSION THAT "SUBSTANTIAL CONFUSION" REIGNS IN THE LOWER COURTS IS EQUALLY BASELESS. THE ONLY CONFLICTS IN LAW THEY IDENTIFY INVOLVE ISSUES NOT BEFORE THIS COURT

Petitioners attempt to make a case for this Court's clarification of rules governing municipal regulation of adult businesses by establishing a faulty premise, and then reaching an erroneous conclusion. Although this Court's decisions on adult business regulations have resulted in multiple opinions, the conclusions on the issues germane to this case are clear. Moreover, the "confusion" suggested by petitioners has not occurred on any of the issues presented in this case.

Petitioners are correct that *Renton*, 475 U.S. at 51-52 established the baseline for the regulation of adult businesses. Petition, p. 12. They note that in this decade this Court has issued plurality decisions in two adult business cases: *City of Erie*, 529 U.S. at 282 and *Alameda Books*, 535 U.S. at 428. At that point petitioners depart from reality.

The disagreement among justices in this Court is focused not on the level of scrutiny by the courts or on the deference that the courts should pay to the reasonable judgments of municipalities in relying upon the studies or experiences of others. This was a lesson delivered in *Renton*, 475 U.S. at 51-52, and followed by the pluralities in *Erie*, 529 U.S. at 283 (plurality opinion) and *Alameda Books*, 535 U.S. at 438 (plurality opinion). Not even the dissenting justices in those cases had difficulty with that basic rule. *See, e.g., Erie*, 529 U.S. at 310 (Souter, J., dissenting) and *Alameda Books*, 535 U.S. at 460 (Souter, J., dissenting).

The principal divergence from *Renton* to the present focuses on the *type* of evidence that should be considered by municipalities to justify the regulation of adult businesses. Dissenting justices in *Erie* and *Alameda Books* felt that "empirical" evidence was necessary to establish adverse impacts of adult businesses, and to justify the municipal regulation of those businesses. *See, e.g., Erie*, 529 U.S. at 314-16 (Souter, J., dissenting) and *Alameda Books*, 535 U.S. at 458 (Souter, J., dissenting). Petitioners gloss over this critical distinction in their bid to convince this Court that its decisions have created a "confusing body of case law." Petition, p. 14. In fact, the law on this subject is fairly clear and Petitioners cannot make a case to the contrary.

Admittedly, the existence of plurality opinions requires one extra step in selecting the precedential weight of a decision. No one disputes the application of the test in *Marks v. United States*, 430 U.S. 188, 193 (1977) to determine the holding of the Court when a plurality decision occurs. Similarly, none of the courts of appeal have had any difficulty in applying the *Marks* rule to determine the rule of this Court in *Erie* or *Alameda Books*, for the purpose of determining how those cases have "clarified" the baseline doctrine established in *Renton*. Petitioners' claims to the contrary are simply baseless.

Petitioners mis-cite *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) for the proposition that the evidentiary showing on the quantity of "empirical evidence" necessary to meet the requisite test is part of that "confusing body of law." Petition, p. 14. Just the opposite is true: The *Heideman* court construed this Court's holding in *Alameda Books* to mean that cities need not rely upon empirical evidence at all in order to justify their regulations of adult businesses. 348 F.3d at 1197-99. That court, like the plurality and Justice Kennedy's concurring opinion in *Alameda Books*, rejected the notion that empirical evidence is required at all. *Id.*

Similarly, other courts of appeal have had little difficulty in reading the *Alameda Books* decisions on this critical issue. In *G. M. Enterprises, Inc.,* the court addressed the plaintiff's argument that empirical evidence of the type necessary for the support of expert opinions should be required. In rejecting the principle advanced by Petitioners the court stated:

> Under the plaintiff's view, the Town cannot demonstrate a reasonable belief in a causal relationship between the activity regulated and secondary

> effects, as required by *Alameda Books and Renton*, unless the studies it relied upon are of sufficient methodological rigor to be admissible under *Daubert [v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).] **This argument is completely unfounded.**

350 F.3d at 640 (emphasis supplied). The court explained that the plurality opinion in *Alameda Books* "bluntly rejected" the suggestion in Justice Souter's dissent that "the municipality be required to present empirical data." *Id.* The court held that such a requirement "would impose an unreasonable burden on the legislative process" and that *Alameda Books* imposed no such requirement to prove definitively that a regulation would reduce adverse secondary effects. *Id.*

That court was not confused.

A similar issue was raised in *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *cert. denied,* 126 S. Ct. 374 (2005). Plaintiff suggested that *Alameda Books* required a municipality to show that its conclusions were supported by statistical (empirical) evidence demonstrating that adverse secondary effects resulted at the specific locations that were being regulated. The court rejected that contention, stating: "This is simply not the law." *Id.* The Ninth Circuit had no difficulty in applying the basic *Renton* standard, with the procedural clarification set forth in *Alameda Books.* It was able to state what "simply" was or was not the law, without any so-called confusion on the appropriate standard.[4] *Accord*: *Center for*

[4] Petitioners cite *Gammoh* for the proposition that the court had some confusion regarding the methodological standards a court must employ to evaluate the adverse impacts of an adult business ordinance.

(Continued on following page)

Fair Public Policy v. Maricopa County, 336 F.3d 1153, 1168 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004) (holding *Alameda Books* clarifies *Renton* standard regarding evidentiary procedures, but that "empirical data" requirement "was specifically rejected in *Alameda Books*"); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1196 (9th Cir. 2004) (applying *Alameda Books* evidentiary burden and finding its application in line with other courts of appeal).

Petitioners cite *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003), *cert. denied,* 540 U.S. 820 (2003), in an attempt to show confusion about the state of the law. They note the potential effectiveness of an article in meeting the requisite evidentiary burden.[5] Petition, pp. 15-16. The only "confusion" generated by the article is that of Petitioners. The court in *SOB* flatly rejected the contention that the article – which questions the methodology of various secondary effects studies by municipalities – created an issue under *Alameda Books* or *Erie*. *Id.* at 863. In purported "contrast," Petitioners cite *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1169 (10th Cir. 2006), which

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Petition, p. 19. That is false. Petitioners' citation (to page 1126 of *Gammoh*) contains no such confusion. On the following page the court states simply that it will not "specify the methodology" which *municipalities* may employ, because courts are not in the "business of second-guessing" city planners, citing and quoting *Alameda Books*. The "confusion" noted by Petitioners is theirs alone.

[5] The article is Paul, Linz, Shafer, *Governmental Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 Comm. L. and Pol'y 355 (2001). Petitioners' counsel of record actually co-authored this article, a fact unclear from the way the article is cited in the petition. Citing as an authoritative source an article co-written by counsel of record is a questionable practice, at best.

referenced the article in dictum, stating only that such evidence **might** be relevant.

The bulk of Petitioners' argument rests on the proposition that cases from the Eleventh Circuit considered "empirical evidence" and reached one result, but when other courts considered the same type of evidence they reached "the exact opposite result." Petition, p. 16. Once again, Petitioners establish a false premise and use that to reach an erroneous conclusion. For example, the court in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *cert. denied,* 536 U.S. 904 (2002) did consider an empirical study of local crime. That was not because such an empirical analysis is *required* by *Renton, Erie* or *Alameda Books.* Rather, the county in that case *elected* to conduct an empirical study of local conditions. The court determined that if that local study conflicted with other studies regarding crime in other locations, the county could not reasonably rely on the other studies, and ignore the local one. *Id.* at 986. That is common sense. It reflects neither confusion in the applicable standard nor a conflict among the circuits.

The court in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251 (11th Cir. 2003), *cert. denied,* 541 U.S. 988 (2004), cited and applied the rule in *Renton* but noted that the county failed to produce *any* evidence to justify the enactment of its ordinance. 337 F.3d at 1267.

The Eleventh Circuit's most recent treatment of the issue lays to rest any contention that there is confusion among the circuits in judging the constitutionality of adult business regulations. In *Zibtluda, L.L.C. v. Gwinnett County, Georgia*, 411 F.3d 1278 (11th Cir. 2005), the court

squarely dealt with the level of scrutiny to apply to regulations targeting the "secondary effects" of adult businesses. Relying on *Renton* and *Alameda Books*, the court found that local governments may rely on "the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as [the officials'] own wisdom and common sense" in enacting adult business regulations. *Id.* at 1286. In *Zibtluda*, the Eleventh Circuit examined the face of the subject ordinance, its text, the preamble or express legislative findings associated with it, its legislative history, and studies and information of which legislators were aware. Based on that alone, the Court found the ordinance constitutional because it clearly was enacted to target the secondary effects of adult businesses. *Id.* at 1288-89.

This is from the circuit Petitioners contend creates the conflict.

The established rule is applied in those cases which Petitioners attempt to show conflict with *Flanigan's Enterprises* and *Peek-A-Boo Lounge*. Petition, pp. 16-18. In *G. M. Enterprises, supra; DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied,* 529 U.S. 1067 (2000);[6] and *Gammoh*, *supra*, the courts adhered to the well-established rule from *Renton* and its progeny that a municipality may rely on evidence that it reasonably believes to be relevant. Other circuits agree. *See*, *Hobbs v.*

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[6] *DiMa* was decided in 1999, long before the purported "confusion" generated by this Court's decisions in *Erie* and *Alameda Books*. It is not surprising, though, that it reaches the same conclusion as post-*Alameda Books* decisions that expert testimony questioning the truth of the studies relied upon is not relevant to an analysis whether the municipality was reasonable in considering them.

County of Westchester, 397 F.3d 133, 153 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 340 (2005); *H and A Land Corp. v. City of Kennedale, Texas*, ___ F.3d ___, 2007 W.L. 531982 (5th Cir. Feb. 22, 2007); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 559 (5th Cir. 2006). State courts of last resort also consistently apply *Renton* and its progeny and reach the same result. *See McCrothers Corp. v. City of Mandan*, ___ N.W.2d ___, 2007 W.L. 602442, *13 (N.D. Feb. 28, 2007); *Commonwealth of Kentucky v. Jameson*, ___ S.W.3d ___, 2006 W.L. 3386489, *20-*23 (Ky. Nov. 22, 2006); *City of Chicago v. Pooh Bah Enterprises, Inc.*, ___ N.E.2d ___, 2006 W.L. 2827608, *19-*21 (Ill. Oct. 5, 2006).

Expert testimony or similar studies that question the *truth* of studies upon which a municipality relies are not germane to the *Renton* analysis. Any "conflict" among the circuits on this issue which Petitioners attempt to create is illusory.

Finally, Petitioners raise two legal issues relating to adult business regulations which are not present in this case. Petition, p. 18. Whether appellate courts may disagree upon the legal effect of regulations governing "purely retail" adult bookstores (i.e., no on-premises viewing) or regulations governing "one-time" adult presentations, are not issues in contention here. Both Petitioners regularly present live "sexually oriented entertainment" as defined by Chapter 6.54. Any discussion of these other issues in this case is strictly academic.

II. CHALLENGING ADULT BUSINESS REGULATIONS HAS ALWAYS BEEN DIFFICULT DUE TO THE REQUIRED DEFERENCE GIVEN TO LEGISLATIVE JUDGMENTS. THE SIXTH CIRCUIT'S DECISION DOES NOT ALTER THE LAW

Whether an adult business may take unlimited discovery in a case challenging an adult business regulation is addressed in Section III below. However, Petitioners assume that their inability to take such discovery in this case will make it "virtually impossible" to challenge such regulations. Petition, p. 20. Petitioners then construct an argument so contorted that confusion appears to be the object.

Petitioners bemoan the difficulty of a litigant to "cast doubt upon" a government's rationale, the standard first set forth in 2002 in *Alameda Books*, 535 U.S. at 438-39 (plurality opinion). Justice Souter *dissented* from this opinion, concluding that municipalities must produce empirical evidence to justify their regulation of adult businesses. 535 U.S. at 458-60. Justice Souter took the same position in *Erie*, 529 U.S. at 313-17 (Souter, J., dissenting). However, his opinion in *Erie* recognizes that he had **changed his mind** since writing a concurring decision in *Barnes,* 501 U.S. at 582 (Souter, J. concurring). 535 U.S. at 316-17. It is this concurring opinion in the 1991 *Barnes* decision, which the author has since disavowed, that forms the basis for Petitioners' conclusion the body of adult entertainment law is unworkable. Petition, p. 20.

Petitioners claim to need discovery on the governmental interest at the time of enactment. Petition, p. 20. As set forth in more detail in the discussion below, the legislative

record justifying the enactment is sufficient to show the evidence the municipality relied upon; no one may probe the motivations of a legislator in voting for or against a bill. *See* Section III, *infra*.

Petitioners cite to *World Wide Video*, 368 F.3d at 1190, 1195, as a case illustrating their need for discovery. Petition, p. 22. Petitioners represent that the plaintiff in that case provided evidence refuting the city's conclusion that adult businesses caused increased crime and lowered property values, but the plaintiff did not succeed in "casting direct doubt" under *Alameda* because evidence of "litter" near the businesses had not been refuted.[7]

Petitioners misrepresent the facts and holding of that case. First, the city's regulation was not upheld on the basis of litter-prevention alone. The plaintiff in *World Wide Video* failed to "cast direct doubt" upon evidence of public lewdness, drug transactions and prostitution at the adult businesses in the city. 368 F.3d at 1190 and 1195-96. Second, Petitioners fail to mention that the "litter" at issue was pornographic material left around the adult businesses "featuring graphic depictions of sexual acts." *Id.* at 1190. Both the appellate and trial courts held that the elimination of this litter, which was found routinely by minors, served a substantial governmental interest in the protection of minors. *Id.* at 1195. There can be little doubt that the regulations in *World Wide Video* were appropriate

[7] In their footnote on the subject, Petitioners question whether litter can ever be a basis for suppressing expression. Petition, p. 22 n. 11. But each of the decisions cited therein considered the eradication of litter for aesthetic reasons. None of those cases involved **pornographic litter that was regularly viewed by minors**, which was at issue in *World Wide Video*.

to combat secondary effects, regardless of the availability of discovery.

In complaining about their inability to obtain discovery into the Metropolitan Council's motives in enacting Chapter 6.54, Petitioners are really complaining about the degree of deference courts afford local governments in trying to fashion remedies to address local problems. Members of the local legislative body are in a better position to gather and evaluate data on local problems than the judiciary, and they are to be afforded substantial deference in their assessments and evaluations of solutions to problems within their city. *Alameda Books*, 535 U.S. at 440 (O'Connor, J., plurality).

III. THE SIXTH CIRCUIT FOLLOWED TWO DECADES OF ESTABLISHED LAW IN LIMITING THE SCOPE OF ITS REVIEW AND DISCOVERY

Petitioners proclaim that the Sixth Circuit opinion "subverts" the rules of evidence by limiting both the scope of review of legislative action and permissible discovery of that action. Petition, p. 23. They argue that the courts (including this Court) are somehow confused in thinking that their role is *not* to determine the objective truth of studies and other data relied upon by municipalities in justifying the regulation of adult businesses. Only the Petitioners are confused: consistent precedent from this Court over the previous twenty years guided the Sixth Circuit and the District Court to correctly limit both the scope of review and permissible discovery.

The limited scope of review of a court considering the validity of an adult business ordinance was set forth first in *Renton*, 475 U.S. at 51-52 ("The First Amendment does

not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.") Thus, a city's reasonable belief in the evidence relied upon – and **not the objective truth of that evidence** – is all that reviewing courts require to justify the enactment. This standard was reconfirmed by this Court in *Erie,* 529 U.S. at 296 (plurality opinion, citing and quoting *Renton*) and at 313 (Souter, J., concurring in part and dissenting in part, citing and quoting *Renton*), and again in *Alameda Books,* 535 U.S. at 438 (plurality opinion, citing and quoting *Renton*) and 451 (Kennedy, J., concurring, citing and quoting *Renton*).

When Petitioners decry the unfairness of courts not pursuing the actual truth, they show not an injustice but their own dissatisfaction with established law.[8] Were the courts required to weigh conflicting evidence regarding the adverse impacts of adult businesses, the rule in *Renton*, *Erie* and *Alameda Books* would be abrogated: municipalities would *not* have the right to rely upon the studies and experiences of other jurisdictions. The established law is that *proof* of adverse secondary effects of adult businesses is not required by municipalities. *See, e.g., G.M. Enterprises, Inc.,* 350 F.3d at 640 (holding *Alameda Books* does

[8] Petitioners refer to the holding in *DiMa Corp.,* 185 F.3d at 831, Petition, p. 23 n. 12, as prohibiting an inquiry into the truth of studies relied upon by municipalities. Petitioners' reading of that case is accurate. What is inaccurate is their assertion that the Court of Appeals' conclusion was somehow erroneous. This Court denied certiorari in *DiMa* for good reason – the decision was in line with the *Renton* rule and subsequent endorsements of that rule by this Court.

not require municipalities to prove secondary effects if they reasonably rely on the studies of others); *Gammoh*, 395 F.2d at 1126 n. 5 (same); *South Salt Lake*, 348 F.3d at 1197 (same).

The Eleventh Circuit decisions in *Flanigan's Enterprises* and *Peek-A-Boo Lounge* provide no support for Petitioners' contention. *See* Petition, pp. 24-25. Both cases involved the plain application of the proper standard from *Renton*, *Erie* and/or *Alameda Books*. However, the courts there found that for specific factual reasons not present in this case the municipalities did not meet the applicable standard. In *Flanigan's Enterprises* the court found that the county could have simply relied upon the studies of others. 242 F.3d at 985 (citing *Erie* and *Renton*). However, it did not. It conducted its own study of its own actual experiences, which did not support any finding that the enacted regulations were necessary to curb adverse impacts of adult businesses. *Id.* at 986. The court in *Peek-A-Boo Lounge* cited and applied the rule in *Renton* but noted that the county failed to produce *any* evidence to justify the enactment of its ordinance. 337 F.3d at 1267.

Neither of the facts that distinguish the decisions in those cases is present here. There was ample evidence of "secondary effects" before the Metropolitan Council when it enacted Chapter 6.54. Petitioners only seek to challenge the "truth" of that evidence, a standard which this Court has rejected for more than twenty years.

Finally, Petitioners argue that the deprivation of sweeping discovery rights has somehow impeded their

rights under *Alameda Books*. Petition, pp. 26-27.[9] That argument is baseless. This Court has long held that a challenge to a legislative enactment may **not** include sweeping discovery of the motivations, thoughts or deliberative processes of the legislative body. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) ("[i]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators. . . ."); *quoting Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-70 (1981); *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

IV. PETITIONERS RECEIVED AN ABUNDANCE OF DISCOVERY, INCLUDING THE LEGISLATIVE RECORD, VIDEOTAPES AND DEPOSITIONS

In complaining about not being permitted to take discovery, Petitioners overlook the amount of discovery they actually **did** take. Petitioners served interrogatories and document production requests, to which Respondent served its answers and responses on September 18, 1998, a full seven months before the three-day injunction hearing in April, 1999. App. 11-19. There is no question that Petitioners had access to the legislative record on which the Metropolitan Council relied, since multiple copies of all these documents were furnished to counsel for Petitioners as part of the discovery responses. App. 15-17. This

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[9] Earlier, Petitioners referred to the District Court's limitation on the scope of discovery as a "'no discovery' ruling." Petition, p. 23. That is incorrect. There is no dispute that Petitioners had access to the legislative record of the Respondent that was offered to justify the ordinances at issue. App. 15-17. Petitioners were simply limited by the protective order from undertaking impermissible discovery based on the authorities discussed above.

legislative record was actually filed with the Metropolitan Clerk in 1997 prior to the first vote on the ordinance. App. 4-7.

Just like any citizen, Petitioners had unfettered access to these materials once they were filed with the Metropolitan Clerk, since the Metropolitan Clerk's office is the office charged with the recording and safekeeping of minutes, resolutions and ordinances of the Metropolitan Council and of all other documents relating to official actions of the Metropolitan Government. App. 41. Petitioners could have actually reviewed this evidence before Chapter 6.54 became law.

Petitioners also overlook the depositions to which the government did not object, and which were actually taken on October 21 and 28, 1998. The government did not object to subject areas 1-4, 20, 34 and 37 of the Rule 30(b)(6) deposition notice (Déjà vu app. 374-381), and deponents were made available to testify on these topics. Déjà vu App. 119-120.[10] The following government officials were deposed:

- Terry Cobb, Director of Department of Codes Administration

[10] Requests 1-2 pertained to "the initial proposal of and subsequent drafting of the ordinance." Requests 3-4 sought "any and all documents submitted to the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption and enactment" of the ordinance. Request 20 pertained to the creation and appointment of persons to the "Sexually Oriented Business Licensing Board." Request 34 pertained to the identities of each and every "sexually oriented business/establishment" located within Davidson County. Request 37 pertained to the method by which the licenses and permit fees and the applicable renewal fees were determined.

- Marilyn Swing, Metropolitan Clerk
- Lon F. West, Zoning Administrator
- Donald Jones, Esq., Director of Council Research Staff for the Metropolitan Council and Special Counsel to the Council (App. 43-46).

In addition, Petitioners were provided copies of all videotapes or audiotapes of all Metropolitan Council and committee meetings at which Chapter 6.54 and any amendments thereto were discussed, as well as the minutes of those meetings. App. 12, 15.

Finally, Petitioners' claim that they will be denied "raw crime data" in future cases should be tempered by the fact that the Magistrate Judge allowed them access to such data in this case, yet they never obtained it because they never provided the Respondent with the street addresses of the businesses for which they sought such data. (Déjà vu App. 124-125).

The trial court acted well within its discretion in granting the protective order to limit discovery into information not relevant to a proper review of the justification for the enactment of Chapter 6.54. *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 862 (6th Cir. 2005); *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir. 1999). Accordingly, Petitioners were not impaired in their ability to analyze and attempt to call into question the reasonableness of the Metropolitan Council's reliance on the information before it, as provided in *Alameda Books*.

V. PETITIONERS HAD THEIR DAY IN COURT

Petitioners contend it was improper for the District Court to convert their second "preliminary" injunction into a permanent one and to dismiss the case in December, 1999. Petition, at 27-28. However, this is hardly the typical case where the injunction hearing was being conducted in *haste*, or where less than formal procedures and evidentiary standards were being applied than those which would accompany a trial on the merits, as described in *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981).

Petitioners' first "preliminary" injunction was entered on December 8, 1997. *Deja vu of Nashville, Inc.,* 466 F.3d at 393; Déjà vu App. 3. That injunction was based on a finding that Chapter 6.54 failed to provide "prompt judicial review" of a Board decision to deny, suspend, or revoke a license or a permit. Approximately one year later, that injunction was dissolved. *Id.*

In the interim, Petitioners served written discovery on defendants to which defendants responded, and Petitioners took four depositions of Metropolitan Government officials. App. 11-19 and 43-46.

Shortly after the dissolution of the first injunction, Petitioners filed their second "preliminary" injunction motion on December 17, 1998 (fourteen months after the case was filed). This was the motion for "preliminary" injunction in which Petitioners had been ordered to raise their constitutional challenges to **all** of the other areas of the ordinance, and not to "piecemeal" their requests for injunctive relief. Déjà vu App. 129. Petitioners acknowledge they knew they had to raise "'all' constitutional issues upon which they assert serve as bases for further enjoining the ordinance" in that motion. App. 32. As a

result, the self-described second injunction motion contained "detailed and complex legal arguments that are of the utmost constitutional concern." App. 34. The hearing on this second "preliminary" injunction motion occurred April 13, 14 and 15, 1999, nearly eighteen months after Petitioners filed this case. Déjà vu App. 152.

The concerns expressed in *Camenish* simply do not exist in this case. Petitioners had plenty of time to prepare for the hearing. They had the benefit of receiving through discovery hundreds of pages of evidence upon which the Metropolitan Council relied. They received videotapes and audiotapes of all Metropolitan Council and committee meetings at which Chapter 6.54 and any amendments thereto were discussed. They took four depositions. At the hearing, they called twelve witnesses, including two "experts," and they introduced thousands of pages of documents, either before or during the hearing. The hearing was not conducted in haste, nor were less than formal evidentiary procedures employed. This multi-day hearing had all the attributes of a trial, conducted after voluminous discovery had occurred. Since, in their own words, petitioners knew they had to raise *all* their constitutional challenges in this second motion, there is no injustice in realizing that this litigation has finally come to an end, ten years after it started. App. 26, 32.

What distinguishes this case from *Baby Tam & Co., Inc. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) (Petition p. 28), is the fact that the District Court herein **ordered** Petitioners to put all their remaining constitutional challenges into their second injunction motion, and plaintiffs repeatedly acknowledged they knew they were ordered to do so. Since this was not the case in *Baby Tam*,

that case fails to support Petitioners' argument on this point.

CONCLUSION

The Petition for certiorari should be denied.

Respectfully submitted,

FRANCIS H. YOUNG
Metropolitan Attorney
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE. INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	Case No. 3-97-1066 Judge Higgins Magistrate Judge Griffin
JERRY C. PENDERGRASS, *et al.*, Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.	Consolidated Cases No. 3-97-1176 Judge Higgins Magistrate Judge Griffin (Filed Apr. 12, 1999)

NOTICE OF FILING

Come now defendants, through counsel, and file a copy of all the materials which were placed in front of each Metropolitan Council member when the Council began consideration of the legislation which ultimately became Chapter 6.54. These materials are referenced in the affidavit of Shayna Abrams, attached as Exhibit A to

defendants' reply to plaintiffs' response to motion for a protective order (Docket no. 53).

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY
JAMES L. MURPHY III, # 9589
DIRECTOR OF LAW

/s/ James L. Charles [FHY]
James L. Charles, # 9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young, # 16554
Metropolitan Attorney

/s/ Shayna Abrams [FHY]
Shayna Abrams, # 16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been hand-delivered to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer,

3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 13th day of April 1999.

/s/ Francis H. Young
Francis H. Young

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs,	)	
v.	)	Case No. 3-97-1066
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	)	Judge Nixon Magistrate Griffin
and		
JERRY C. PENDERGRASS, et al., Plaintiffs,	)	
v.	)	Case No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant.	)	

AFFIDAVIT OF SHAYNA ABRAMS

(Filed Oct. 8, 1998)

Shayna Abrams first being duly sworn, deposes and states as follows:

1. I, Shayna Abrams, am an attorney with the Metropolitan Department of Law. Having full personal

knowledge of the matters stated herein, I give this affidavit.

2. I supervised the preparation and compilation of a binder for each member of the Metropolitan Council in connection with Bill no. 97-796.

3. One binder was filed with the Metropolitan Clerk and one binder was placed by me on the desk of each Metropolitan Council member in the Council Chamber prior to the first Council meeting at which Bill No. 97-796 was considered.

4. Each binder contained the following items:

a. A copy of the proposed ordinance including the "whereas" clauses and the Preamble.

b. The following reports from the Metropolitan Police Department:

- A lengthy report from Police Intelligence concerning criminal activity within the sexually oriented entertainment industry in other states as well as locally including a 1993 conviction of an operator of "Cleopatra's Massage" for promoting prostitution.
- A 1990 report from the Assistant Chief of Police regarding sexual activity and prostitution at local adult entertainment establishments, dancing at local sexually oriented establishments by underage persons, and unsanitary conditions, usually within the booths in adult entertainment establishments.
- A 1984 report prepared by the former Chief of Police documenting the unsanitary conditions of the adult entertainment businesses.

- Two reports of the police service calls to adult businesses or the areas near the business covering 1-1-92 to 4-14-93 and 1-1-96 to 1-31-97.
- A report from two officers who visited various adult entertainment businesses from 3-31-97 to 4-11-97 describing what they witnessed at these businesses.

c. Reports from the Metropolitan Health Department from 1994 and 1997 regarding the unsanitary conditions at various adult entertainment businesses. An affidavit of Dr. Michael Bongiovanni discussing the transmission of HIV and hepatitis B from bodily fluids. A 1990 memo from Preventative Health Services of Tucson regarding the need for regulation in adult entertainment establishments due to the spread of infectious and contagious disease through sexual contact.

d. 1997 Photos taken by the Metropolitan Police Department of the Purple Onion, an adult entertainment establishment.

e. A copy of Chattanooga's ordinance, litigated in *DLS v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1996).

f. A copy of the Sixth Circuit opinion in *DLS v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1996).

g. A copy of the district court's opinion in *DLS v. City of Chattanooga,* 894 F.Supp. 1140 (E.D. Tenn 1995).

h. A copy of the district court's opinion in *DLS v. City of Chatanooga,* 914 F.Supp. 193 (E.D. Tenn. 1995).

i. A 1984 report regarding the zoning of adult entertainment businesses in Nashville.

j. The 1989 Report of the Minnesota Attorney General's Working Group on the Regulation of Sexually-oriented Businesses.

k. A planning study by the city of Phoenix, Arizona discussing adult businesses and comparing the crimes in control areas (areas without adult businesses but with a similar population and characteristics) to crimes in study areas (areas with adult businesses).

l. Summaries of various land use studies listing the secondary effects found regarding sexually-oriented businesses in the study area. The summaries included: Phoenix, AZ, Tucson, AZ, Garden Grove, CA, Los Angeles, CA, Whittier, CA, Indianapolis, IN, Minneapolis, MN, Cleveland, OH, Oklahoma City, OK, Amarillo, TX, Austin, TX, Beaumont, TX, Houston, TX, and Seattle, WA.

m. A 1986 Austin, Texas, study conducted in support of a new zoning ordinance which found increased crime and decreased property values in areas near sexually-oriented businesses.

FURTHER, AFFIANT SAITH NOT

/s/ Shayna Abrams
Shayna Abrams

Sworn to and subscribed before me, a Notary Public, this 7th day of October, 1998.

/s/ Steven D. Mayo
NOTARY PUBLIC

My Commission Expires: 9-23-2000.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE, AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	Judge Higgins
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS –
PRELIMINARY INJUNCTION

VOLUME III of Three

BEFORE THE HON. THOMAS A. HIGGINS,
U.S. District Judge

on April 15, 1999

APPEARANCES:

As hereinbefore noted.

* * *

[505] THE COURT: Yes. But the issues of *res judicata* really deals with issues between the same parties.

MR. SHAFER: The arguments we have made is collateral estoppel, Your Honor.

THE COURT: Well, collateral estoppel may or may not fit closer than putting the label *res judicata* on.

MR. SHAFER: I believe our briefs primarily make the argument of collateral estoppel.

THE COURT: I was looking at Mr. Sirkin's proposed findings this morning and constant reference to *res judicata*. There isn't any relation between the plaintiffs in this case to the plaintiffs in *Ellwest*.

MR. SHAFER: No. But we have submitted to the court briefing in regard to the Tennessee law of mutuality of parties not being required in Tennessee under collateral estoppel.

THE COURT: Did Dr. Boatright or Mr. Watkins speak to the question of the fees? And whether the fees covered the expense in administering this ordinance?

MR. CHARLES: Your Honor, Mr. Terry Cobb, who is the director of Codes, his deposition was taken and it's – part of his deposition are cited in the brief as well as the findings of facts.

THE COURT: And you offer that deposition testimony as proof in this record?

[506] MR. CHARLES: Yes, sir, we would like to do that.

THE COURT: All right. There's no objection to it, then you can. And we have never really resolved this notice of filing. Is there any objection by the plaintiff to the court's consideration of this as evidence in the record?

MR. SHAFER: Which one? Is that the secondary effects?

THE COURT: It's 147.

MR. CHARLES: Yes, Your Honor, that's the secondary.

MR. SHAFER: No objection, Your Honor.

THE COURT: Thi is the information that was placed in front of the metropolitan council.

MR. CHARLES: That's correct, Your Honor.

THE COURT: All right. There is no objection –

MR. SHAFER: No objection.

THE COURT: – to the court's consideration of it. All right.

Well, we'll come back at 1:30. Recess court.

(Whereupon, a recess was had.)

THE COURT: Mr. Shafer, are you ready?

MR. SHAFER: Yes, Your Honor. Your Honor, I had only planned on calling one witness, I need to recall Mr. Rucker for a minute, and I need to introduce two exhibits. I have given them to counsel.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DEJA VU OF NASHVILLE. INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	Case No. 3-97-1066 Judge Nixon Magistrate Griffin
	Consolidated Cases
JERRY C. PENDERGRASS, ET AL. Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE Defendant.	No. 3-97-1176 Judge Nixon Magistrate Judge Griffin

DEFENDANTS' ANSWERS TO PLAINTIFFS' INTERROGATORIES AND RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Please identify any and all persons responsible for drafting, or who had input into Chapter 6.54, as originally

introduced, any amendments proposed, accepted or rejected from the date of its introduction on June 3, 1997 to its passage on third reading on August 19, 1997, and any amendments proposed, adopted or rejected subsequent to its approval by the Honorable Phillip Bredesen on August 25, 1997.

RESPONSE: Objection. The information sought in this interrogatory is not relevant to the subject matter involved in the pending litigation and is beyond the scope of discovery as it is not reasonably calculated to lead to the discovery of admissible evidence in accordance with the Fed. R. Civ. P. 26(b)(1). Without waiving the objection, videotapes or audiotapes of all Metropolitan Council meetings at which Chapter 6.54 and any amendments thereto were discussed are being furnished plaintiffs in response to document production request no. 2. Copies of minutes of any committee meetings at which Chapter 6.54 or its amendments were discussed are being furnished in response to document production request no. 2.

2. Please identify the source of any textual part of Chapter 6.54 and any amendments proposed, adopted or rejected prior to its initial passage or thereafter which were not originally created or composed by members of the Metropolitan Council, its staff, employees, agents or attorneys, any individual member thereof and/or any council, committee or subcommittee.

RESPONSE: Objection. The information sought in this interrogatory is not relevant to the subject matter involved in the pending litigation and is beyond the scope of discovery as is not reasonably calculated to lead to the discovery of admissible evidence in accordance with Fed. R. of Civ. P. 26(b)(1). Without waiving the objection, the one

amendment which was proposed and not incorporated into Chapter 6.54 was drafted by Mr. George Barrett.

3. Please identify all general laws of the State of Tennessee authorizing and empowering the Metropolitan County Council of the Metropolitan Government of Nashville and Davidson County to enact regulatory ordinances protecting and promoting the general welfare, health and safety of its citizens.

RESPONSE: Objection. This interrogatory asks for a purely legal conclusion. Without waiving this objection, plaintiffs are invited to refer to *Ellwest Stereo Theater Inc. v. Boner,* 718 F.Supp. 1553 (M.D. Tenn. 1989).

4. Please identify each and every of the "governmental interests" that are sought to be furthered or addressed by Chapter 6.54.

RESPONSE: Objection. This interrogatory asks for a purely legal conclusion. Without waiving the objection, governmental interests are described in Chapter 6.54 in "Whereas" clauses 4 and 8 and in Section 1 "Purpose," Section 1 "findings" paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 30, 31 and 32.

5. Please identify all persons having knowledge of the nexus or connection between adverse secondary effects of the adult entertainment establishments operated by Plaintiffs or in which Plaintiffs are employed.

RESPONSE: Defendants cannot answer this interrogatory due to its confusing wording. Specifically, it asks for the "nexus between the secondary effects of the adult entertainment establishments operated by the plaintiffs" and no other item is listed. The confusion is that

the words "nexus" and "between" usually refer to two things to be related and only one is listed in this interrogatory. If plaintiffs will submit a revised version of this interrogatory defendants will serve a response to it.

6. Please identify any and all persons having knowledge that no adverse secondary effects are produced by adult entertainment establishments such as those operated by Plaintiffs in Nashville and Davidson County, Tennessee.

RESPONSE: This information is unknown to Defendants.

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I hereby swear/affirm that the answers to the foregoing interrogatories are true to the best of my knowledge, information and belief.

/s/ Donald W. Jones
Donald W. Jones,
Council Staff Director

Sworn to and subscribed before me, a Notary Public, this 23 day of September 1998.

/s/ Roseanne Hayes
NOTARY PUBLIC

My Commission Expires: March 25, 2000

RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

Come the defendants The Metropolitan Government of Nashville and Davidson County and Emmett H. Turner and respond to plaintiffs' request for production of documents as follows:

1. Please produce Section 2.01(40) of the Charter of the Metropolitan Government of Nashville and Davidson County.

RESPONSE: See responsive document attached.

2. Please produce transcripts and/or tape recordings of any council or council committee hearings at which evidence concerning the adverse secondary effects of adult uses on the community was presented to the Metropolitan Council in the course of its consideration and adoption of Chapter 6.54 and any amendments adopted, rejected or accepted from the time of its original introduction, its passage on third reading, its approval by Mayor Bredesen, and thereafter and transcripts and/or tape recordings of any council or council committee hearings or *debates* at which Chapter 6.54 or any proposed, adopted or rejected amendment was considered, debated or voted upon.

RESPONSE: No evidence was presented orally to the Metropolitan Council. Two sets of copies of videotapes or audiotapes of all sessions of the Metropolitan Council at which Chapter 6.54 and any of its amendments were considered are being furnished, one set to Mr. Shafer and one to Mr. Herbison. Copies of minutes of Metropolitan Council committee meetings at which Chapter 6.54 and any of its amendments were considered are being furnished. Defendants believe that a transcript of the July 1,

1997 Council session was taken and is in the possession of Mr. Herbison.

3. Please produce any findings incorporated in the several court decisions listed in Section 1(B) of Chapter 6.54 which were relied upon by the Metropolitan Council in the adoption of Chapter 6.54 and which are not set forth in the printed version of the several cases referred to therein, to wit: *D.L.S., d/b/a Diamonds and Lace Show Bar v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997); *D.L.S., Inc., a/b/a Diamonds and Lace Show Bar v. City of Chattanooga,* 914 F.Supp. 193 (E.D. Tenn. 1995); *D.L.S., Inc. a/b/a Diamonds and Lace Show Bar v. City of Chattanooga,* 894 F.Supp. 1140 (E.D. Tenn. 1995); *City of Renton* v. *Playtime Theaters. Inc.,* 475 U.S. 41 (1986); *Colin A. Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

RESPONSE: There are no documents responsive to this request.

4. Please produce all studies and judicial opinions concerning the adverse secondary effects of adult uses of the communities of Austin, Amarillo and Beaumont, Texas; Phoenix and Tucson, Arizona; Minnesota; Seattle, Washington, which were considered and relied upon by the Metropolitan Council in the adoption of Chapter 6.54.

RESPONSE: There are two complete sets of the identical documents presented to the Metropolitan Council when its members considered and voted upon Chapter 6.54 and its amendments. One set of these documents is being furnished to Mr. Shafer and the other set to Mr. Herbison. Contained within these documents is the information sought in this request.

5. Please produce all reports from the police department and from the Department of Health of the Metropolitan Government of Nashville and Davidson County which the Metropolitan Council relied upon in consideration and adoption of Chapter 6.54.

RESPONSE: See documents produced in response to request no. 4.

6. Any and all documents submitted to, relied upon or serving as bases for the several conclusions and/or findings of the Metropolitan Council contained in subparagraphs 1(B)1 through 1(B)32 of Chapter 6.54.

RESPONSE: See documents produced in response to request no. 4.

7. Copies of any and all reports and recommendations from employees, citizens, other local governments, and other reputable sources as referred to in the third whereas clause on page 1 of Chapter 6.54 which support the conclusion set forth in said whereas clause that "locational criteria alone do not adequately protect the health and general welfare of the people of Metropolitan Nashville and Davidson County" or which support any other conclusion, determination or finding made by the Metropolitan Council in the drafting, consideration and passage of Chapter 6.54, and any amendments thereto whether adopted before or after the passage of Chapter 6.54.

RESPONSE: Objection. This request asks for a purely legal conclusion. Without waiving the objection, no responsive documents exist.

8. Please produce copies of any and all reports, studies or evidence showing or demonstrating that there is not a connection or nexus between undesirable adverse

secondary effects in adult entertainment establishments in Nashville and Davidson County or elsewhere or which show that adverse secondary effects produced by adult entertainment establishments such as those operated by Plaintiffs or in which Plaintiffs are employed are no greater than produced by other types of businesses such as convenience stores, gas stations and other places of business which are open and attract customers either on a 24 hour basis or during extended evening hours.

RESPONSE: Defendants cannot answer this request due to the confusing wording. Specifically, it asks for "evidence showing or demonstrating that there is not a connection or nexus between undesirable adverse secondary effects in adult entertainment establishments in Nashville and Davidson County or elsewhere" and no other item is listed. The confusion is that the words "nexus" and "between" usually refer to two things to be related and only one is listed in this interrogatory. However, without waiving the objection to the confusing nature of this request, and assuming that Plaintiffs are asking if Defendants have any studies to show that sexually oriented businesses do not cause secondary effects, there are no responsive documents to this request.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASH-
VILLE AND DAVIDSON
COUNTY
JAMES L. MURPHY III,
9589
DIRECTOR OF LAW

/s/ James L. Charles [FHY]
James L. Charles, #9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young, #16554
Metropolitan Attorney

/s/ Shayna Abrams
Shayna Abrams, #16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and the original was mailed to Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 18th day of September, 1998.

/s/ Shayna Abrams
Shayna Abrams

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al., Plaintiffs,	)	
vs.	)	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE, AND DAVIDSON COUNTY, TENNESSEE, et al., Defendants.	)	Judge Higgins

TRANSCRIPT OF PROCEEDINGS –
PRELIMINARY INJUNCTION

VOLUME II of Three

BEFORE THE HON. THOMAS A. HIGGINS,
U.S. District Judge

on April 14, 1999

APPEARANCES:

As hereinbefore noted.

[416] DANIEL G. LINZ,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAFER:

Q. Dr. Linz, what is your profession?

A. I am a psychologist by training. I am a university professor and I'm a professor in the Department of Communication and chair of the Law and Society Program at the University of California Santa Barbara.

Q. For those of us who are not in academia, chair means chairman of the department?

A. Yes. We don't say chairman any more. We say chair.

Q. Chairperson?

A. Chairperson or chair.

Q. All right. Where did you grow up?

A. I was born in Cincinnati, but spent most of my life in Kentucky, in north Kentucky, where I attended Northern Kentucky University, and then went from –

THE COURT: Doctor, speak up.

THE WITNESS: Sorry. Born in Cincinnati, but lived most of my life – early life in Kentucky, where I went to Northern Kentucky University.

BY MR. SHAFER:

Q. And, Doctor, did you get a degree at Northern Kentucky University?

[417] A. Actually two degrees; a degree in psychology and a degree in sociology, from Northern Kentucky.

Q. And did you get any degrees after that?

A. Yes. Then I moved to Madison, Wisconsin, where I obtained a master's degree in sociology and a Ph.D. in psychology from the University of Wisconsin Madison.

Q. Now, Doctor, there are psychologists who bring a person in to their office, have them lay down on a bed, and have them tell their tale of woe. Is that the type of psychologist you are?

A. No. I'm a psychologist, but not the fun kind.

Q. Okay.

A. Most of my psychology has to do with numbers and statistics. I'm interested in general patterns of human behavior, and in particular I'm an experimental social psychologist, so what I'm interested in is the factors in one's environment that influence attitudes and behaviors.

Q. Is there a particular phrase for that, experimental psychologist or research psychologist or what?

A. An experimental psychologist, a research social psychologist would be an appropriate term. Over the years my research has concentrated on primarily the effects of mass media on human behavior, primarily in the area of sex and violence in the media.

Q. Would that include forms of entertainment?

[418] A. Yes.

Q. And, Doctor, do you have a resume or curriculum vitae?

A. Yes, I do.

Q. Okay. Doctor, I'm going to hand you what's been marked for identification as Plaintiffs' Exhibit 16 and, sir, is that a copy of your –

A. Yes.

Q. – resume?

A. This is my CV.

Q. Is that, sir, up to date and current?

A. As of February of 1999.

Q. All right.

MR. SHAFER: Your Honor, I move for admission of Plaintiffs' Exhibit 16.

THE COURT: 16 will be received in evidence.

BY MR. SHAFER:

Q. Now, Doctor, the curriculum vitae, I don't want to belabor it, but it goes through all of your professional experiences, correct?

A. Yes.

Q. And where you have taught?

A. Yes.

Q. And what other types of things that you teach?

A. Well, I teach basically four kinds of courses. First it would be what might be termed methodology courses, that is,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)	
Plaintiffs,	)	No. 3-97-1066
	)	Judge Nixon
v.	)	Magistrate Judge Griffin
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Defendants.	)	
JERRY C. PENDERGRASS, et al.,	)	Consolidated Cases
Plaintiffs,	)	No. 3-97-1176
	)	Judge Nixon
v.	)	Magistrate Judge Griffin
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR REVIEW IN REGARD TO MAGISTRATE'S ORDER AND MEMORANDUM ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER, OR IN THE ALTERNATIVE, MOTION IN LIMINE

Plaintiffs Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., the Pleasure

Palace, Inc., Dawn Pierce, and Elizabeth Martz, through counsel, hereby move pursuant to L.R. Rule 303(f) for review of Magistrate Griffin's Order and Memorandum (in regard to Defendants' Motion for Protective Order) entered October 22, 1998, or in the alternative, for an order in limine, and hereby state in support of such motions, the following:

1. Pursuant to an order from the Magistrate, on or about August 28, 1998, Plaintiffs served upon defense counsels a Fed.R.Civ.P. Rule 30(b)(6) deposition notice setting forth thirty-nine (39) specific areas of inquiry. See Ex. C (all exhibits identified herein are attached to the brief in support of these motions). Pursuant to rule, Defendants were to then designate certain individuals who could testify in regard to these matters.

2. Defendants filed a motion for protective order in regard to this deposition notice, objecting to virtually every one of the designated areas of inquiry. Ex. D. Following receipt of the Plaintiffs' response to that motion (Ex. E) and in furtherance of a telephonic conference held with the Magistrate on October 1, 1998 in regard to these discovery disputes, the Defendants submitted a letter to Plaintiffs' counsels dated October 7, 1998, setting forth four general areas as listed on the deposition notice where they would permit deposition discovery. Ex. F. The Defendants continued to object to any deposition inquiry regarding all other listed areas.

3. On October 22, 1998, the Magistrate issued an Order (Ex. H) and a Memorandum (Ex. I) that – with one exception – granted the Defendants' motion for protective order in its entirety. In addition, even in regard to the one area where the Magistrate permitted discovery, her Order

and Memorandum merely addressed the ability of the Plaintiffs to obtain documents containing "raw data" of certain crime statistics, but did not resolve at all the ability of the Plaintiffs to obtain deposition testimony in regard to such materials from a Rule 30(b)(6) deponent.

4. As areas of inquiry 1-4, 20, 34, and 37 (those matters for which Defendants agreed to produce Rule 30(b)(6) deponents) were not subject to the protective order, Plaintiffs hereby request review of the entirety of Magistrate Griffin's Order and Memorandum. Specifically, Plaintiffs seek review of the Magistrate's ruling in regard to deposition items 5-19, 21-33, 35-36, 38-39. While Plaintiffs have submitted an accompanying brief setting forth the basis of the relief requested and the contentions as to why the Magistrate erred in her Order and Memorandum, the basic reasons that Plaintiffs seek review are as follows:

A. Defendants' motion for protective order was procedurally defective, in that it was not accompanied by a certification as required by Fed.R.Civ.P. Rule 26(c) that "the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action . . . ". In fact, no such conference had occurred.

B. The discovery as requested is both relevant, and is necessary to enable the Plaintiffs to not only be able to respond to the Defendants' motion to lift the preliminary injunction, but also to be able to file a more substantive second motion for preliminary injunction (if the Court lifts the first injunction) detailing the constitutional challenges to all of the other areas of the ordinance in question (generally referred to here as "Chapter 6.54") which Plaintiffs contend are constitutionally infirm.

C. Defendants' motion for protective order, in regard to their claim of legislative privilege, was defective in that it failed to contain the requisite information as set forth in Fed.R.Civ.P. Rule 26(b)(5) so that both the Plaintiffs and the Court could assess the applicability of the claimed privilege.

D. No legislative privilege existed in regard to the specific areas of inquiry designated by the Plaintiffs, which was established by the case law cited by the Defendants themselves in their motion for protective order.

E. In regard to the one area where Magistrate Griffin permitted some limited discovery (Item 32 – criminal statistics or other records or information evidencing criminal activity near businesses in Davidson County which are open and attract customers either on a 24-hour basis or during certain late night hours), she addressed the issue of Plaintiffs being entitled to the actual documents, but did not address whether the Defendants would be required to produce a Rule 30(b)(6) deponent who could testify in regard to such information.

5. In that the discovery as requested is relevant to the ultimate matters that this Court will have to decide, and given the fact that the Defendants have precluded discovery in these areas by invoking claims of privilege and other defenses, should this Court uphold the rulings reached by Magistrate Griffin, this Court should further enter an order in limine precluding the Defendants from admitting, submitting, or forwarding either at the time of trial or during any motion for summary judgment, any evidence or arguments that fit within those areas of inquiry from which the Plaintiffs have been precluded from taking discovery depositions as the direct result of

the Defendants invoking the arguments as contained in their motion for protective order.

WHEREFORE, these Plaintiffs request that this Honorable Court enter an order reversing the various decisions of Magistrate Griffin and ordering the Defendants to expeditiously produce deponents who can answer questions concerning the areas of inquiry as found in the Plaintiffs' Rule 30(b)(6) deposition notice, or in the alternative, enter an order in limine precluding the Defendants at any time subsequent in this litigation from submitting any evidence or arguments that relate to those areas of inquiry on Plaintiffs' Rule 30(b)(6) deposition notice where the Plaintiffs have been unable to take such discovery as the result of the Defendants' motion for protective order.

Dated: November 3, 1998

/s/ Bradley J. Shafer
Bradley J. Shafer, MI P36604
Shafer & Associates, P.C.
Attorneys for Plaintiffs
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
517-886-6560 – Telephone
517-886-6565 – Facsimile

Michael F. Pleasants
Co-Counsel for Plaintiffs
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332 – Telephone
901-572-7399 – Facsimile

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served, by UPS Next Day Air, upon ***Francis H. Young and Shayna***

Abrams, 204 Metropolitan Courthouse, Nashville, Tennessee 37201; ***John Herbison,*** 2016 Eighth Avenue South, Nashville, Tennessee 37204; ***H. Louis Sirkin,*** 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776; and *Michael Pleasants,* 8 South Third, Suite 200, Memphis, Tennessee 38103, on the 3rd day of November, 1998.

/s/ Bradley J. Shafer
Bradley J. Shafer

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1066 Judge Nixon Magistrate Judge Griffin
JERRY C. PENDERGRASS, et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	Consolidated Cases No. 3-97-1176 Judge Nixon Magistrate Judge Griffin

PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

-ORAL ARGUMENT REQUESTED-

Plaintiffs move this Honorable Court for a preliminary injunction pursuant to Fed.R.Civ.P. Rule 65, to enjoin enforcement of an amendment to the Code of the Metropolitan

Government of Nashville and Davidson County, Tennessee, generally denoted as Chapter 6.54 (hereinafter "Ch. 6.54"), and state in support as follows:

1. Plaintiffs are all in the business of presented [sic] to the consenting adult public non-obscene sexually explicit entertainment within the City of Nashville and the County of Davidson, including but not limited to clothed, nude and/or semi-nude performance dance entertainment, videotapes, books, and other expressive materials.

2. To date, the conduct of the Plaintiffs is not in violation of any law of the State of Tennessee, or any local ordinance provision.

3. In late 1997, the Metropolitan Council of Nashville and Davidson County enacted Ch. 6.54.

4. Ch. 6.54 is an extremely lengthy and complex code provision containing numerous and various restrictions, regulations, and prohibitions effecting the constitutionality protected conduct of the Plaintiffs, their agents, representatives, tenants and employees, as well as those individuals from the consenting adult public who seek to purchase, rent, and/or view the entertainment and other expressive media provided and/or presented by the Plaintiffs. In short, Ch. 6.54 is a comprehensive regulatory scheme of establishments and individuals engaged in what is generally referred to as "adult" entertainment.

4. In December of 1997, pursuant to a motion filed by these Plaintiffs, this Honorable Court enjoined Ch. 6.54 for failing to provide prompt judicial review and failing to maintain the status quo during any appeal process in regard to the licensing scheme contained therein. Subsequently, the Metropolitan Council amended the ordinance

and was also able to have the State Legislature enact revisions to a statute which, the Defendants contended, cured the constitutional infirmities noted by this Court. In an Order entered on December 3, 1998, this Court, based on those revisions/enactments, lifted the preliminary injunction.

6. In regard to the previous motion for preliminary injunction, the "Deja Vu" Plaintiffs had only raised these two constitutional concerns, and had specifically reserved the briefing and adjudication on other constitutional claims, pending the outcome of that motion. The "Pendergrass" Plaintiffs raised an additional legal argument; that being that the "criminal disabilities" provisions of Ch. 6.54 were unconstitutional. In enjoining Ch. 6.54 because of the lack of prompt judicial review and the failing to maintain the status quo in the appeal process, this Court declined to rule upon the merits of the Pendergrass Plaintiffs' argument in regard to the criminal disabilities provisions.

7. Pursuant to an Order from Magistrate Griffin, the Plaintiffs are now required to file this motion within 10 working days of December 3, 1998; the date upon which the Order was entered by this Honorable Court lifting the injunction. In addition, pursuant to that same Order from Magistrate Griffin, Plaintiffs are required to raise here "all" constitutional issues upon which they assert serve as bases for further enjoining the ordinance. Magistrate Griffin specifically indicated that she did not want the Plaintiffs to "piece-meal" their motions for preliminary injunction.

8. This motion is therefore filed pursuant to the Order of Magistrate Griffin.

9. For the reasons as set forth in the accompanying brief, Ch. 6.54 is unconstitutional both facially and as applied pursuant to the First Amendment; it is both overbroad and vague; it is impermissibly underinclusive; it otherwise denies these Plaintiffs their constitutional right of process under the Fourteenth Amendment to the United States Constitution; and it violates the liberty interests of these Plaintiffs and others.

10. If this ordinance is not preliminarily enjoined, entertainers will be required to undergo a licensing process no later than Thursday, January 14, 1999, which would require them to disclose highly personal information, be fingerprinted, subject themselves to constitutional deprivations, and disclose such information in a process that are matters of public record so as to raise grave concerns about the personal safety of these entertainers – a matter even acknowledged by the Defendants here.

11. If enforcement of Ch. 6.54 is not enjoined before its "effective" date of January 17, 1999, these Plaintiffs will be irreparably harmed in that they will either be required to disengage in the conducting of constitutionally protected expression, or have to comply with an unconstitutional licensing scheme as discussed above.

12. Plaintiffs have fulfilled the legal requirements entitled them to the injunctive relief sought.

13. Because the deadline for entertainers to file applications for permits (so as to be able to continue to engage in constitutionally protected conduct during the consideration of their permit application and any appeals therefrom) is Thursday, January 14, 1999, and because there are literally hundreds of entertainers within the County who would have to file applications and be fingerprinted before

that date (which will obviously take a great deal of time to accomplish), before Thursday, January 14, 1999, in order to prepare and file applications, and undergo the finger-printing process.

14. This motion concerns detailed and complex legal arguments that are of the utmost constitutional concern, given the First Amendment rights involved. Accordingly, Plaintiffs request that this Honorable Court grant oral argument in regard to this motion.

WHEREFORE, for the reasons as set forth in this Motion and the accompanying brief, these Plaintiffs respectfully request this Honorable Court to enter a preliminary injunction enjoining enforcement of Ch. 6.54 until such time as this Court has had an opportunity to rule on the full merits of this matter.

Dated: December 16, 1998 /s/ Bradley J. Shafer

Bradley J. Shafer,
MI P-36604
Shafer & Associates, P.C.
Counsel for "Deja Vu"
Plaintiff
3800 Capital City Blvd.,
Suite 2
Lansing, Michigan 48906-2110
517-886-6560 - Telephone

Michael F. Pleasants
Co-Counsel for "Deja Vu"
Plaintiffs
8 South Third, Suite 200
Memphis, Tennessee 38103

H. Louis Sirkin
Counsel for "Pendergrass"
Plaintiffs
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2776

John Herbison
Counsel for "Pendergrass"
Plaintiffs
2016 Eighth Avenue South
Nashville, Tennessee 37204

MINUTES
METROPOLITAN SEXUALLY ORIENTED BUSINESS LICENSING BOARD

The Sexually Oriented Business Licensing Board held its regular scheduled meeting on December 28, 2005 at 5:00 p.m. The following members were present: Carol Etherington, Michael Mitchell, Camille Steward and Doug Sloan. Johnny Crumby was absent. Representatives from Legal Department, Jamie Wyatt and Frank Young, were present. Staff members Tommye Sutton and Linda Borum were also present. Sonny West was present as a representative from Codes Administration.

Mr. Mitchell made a motion to approve the minutes from the meeting of December 14, 2005 as written, Mr. Sloan seconded the motion and the Board voted unanimously.

Ms. Borum reported to the Board that the following entertainer permit applications were in order, # 3, 4, 10, 47, 49, 50, 51, 52, 53, 54, 55, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 83, 85, 190, 195, 198, 199, 200, 201, 202, 203, 205, 206, 207, 209, 210, 211 and 218. Mr. Mitchell made the motion and Ms. Etherington seconded the motion to approve the above entertainer permit applications. The Board voted unanimously to approve.

Ms. Borum reported to the Board that entertainer permit application #162 did not meet the standards under Section 6.54.070(A)(4)(f) and therefore was not in order for approval due to a Prostitution B Misdemeanor conviction March 14, 2005. Mr. Sloan moved to deny the application and Ms. Steward seconded the motion. The Board voted unanimously to deny.

Ms. Borum informed the Board that the following adult entertainment businesses did meet the standards for approval;

Odyssey Gentlemen's Club at 700 Division Street #185
Vivid at 1907 Division Street #196
Purple Onion #1 at 2807 Nolensville Pike #113
Purple Onion #2 at 2702 Dickerson Pike #114
Christie's at 306 8th Avenue South #48
House of Thrills at 709 3rd Avenue South #8
Pleasure Palace at 2407 Dickerson Pike #1
Ken's Gold Club at 500 5th Avenue South #78
Stephanie's Cabaret at 660 Lafayette Street #153
Déjà Vu at 1214 Demonbreun Street #124
Anthony's Show Place at 410 George Davis Boulevard #146

Mr. Mitchell made the motion to approve and Ms. Steward seconded the motion. The Board voted unanimously to approve the following businesses for an adult entertainment license; Odyssey Gentlemen's Club at 700 Division Street #185, Vivid at 1907 Division Street #196, Purple Onion #1 at 2807 Nolensville Pike #113, Purple Onion #2 at 2702 Dickerson Pike #114, Christie's at 306 8th Avenue South #48, House of Thrills at 709 3rd Avenue South #8, Pleasure Palace at 2407 Dickerson Pike #1, Ken's Gold Club at 500 5th Avenue South #78, Stephanie's Cabaret at 660 Lafayette Street #153, Déjà Vu at 1214 Demonbreun Street #124, Anthony's Show Place at 410 George Davis Boulevard #146.

Ms. Borum reported to the Board that a business license for Babylon Adult Video at 905 Division Street #115 does not meet the standards for a license due to the non-compliance of the building inspection by Codes for 6.54.050(A)(1)(b)(v), "the lighting level of each booth shall be a minimum of ten footcandles at all times as measured

from the floor". According to the inspection report, the lighting level is only 8.9 footcandles. Ms. Steward made the motion to deny, Mr. Mitchell seconded the motion and the Board voted unanimously to deny the license for Babylon Adult Video at 905 Division Street #115.

Mr. Young told the Board that Mr. Bergeron was unable to attend the meeting because of the death of his Mother. The Board extended their condolences to Mr. Bergeron. Mr. Young asked that the Board defer their request by Mr. Bergeron concerning a definition in the ordinance for video and list of procedures for changing the ordinance. The Board agreed to defer this discussion until the meeting of January 11, 2006.

The Board discussed the inspection sheet used by Mr. Cantrell and asked that the line under Item 9 be clarified as to which number on the inspection sheet it referred to.

Mr. Sonny West was present and the Board asked him to give them a brief history of the adult entertainment business in Nashville. Mr. West told the board the first regulation concerning adult entertainment establishments in Nashville was in 1979. The United States Supreme Court ruling (Detroit) that allowed cities to concentrate in one area of the city as opposed to dispersal throughout the county. At that time, Nashville established that adult entertainment establishments would be limited to "CC" and "CF" districts with distance requirements from a park, school, church, residence and other adult entertainment establishments. This issue was litigated with the Classic Cat Club and was in the court system for about then years. The Court upheld the ordinance as far as locational standards are concerned.

A re-write of the ordinance in 1998 occurred and it was the opinion that municipalities had to provide sufficient sites for businesses to locate and was expanded to three industrial districts in addition to the original "CC" and "CF" districts. An Adult Entertainment Overlay was established and zoning requires that all adult entertainment establishes be located within this overlay. At that time there were approximately six businesses outside the "CC" and "CF" districts, these were "grand-fathered" in and are considered "legally non-conforming establishments". Three of these are now out of business. Council saw a need for regulations as far as from a land use perspective. The Supreme Court also ruled that any bookstore with less than 50% of their stock in adult entertainment goods would be classified as non-adult entertainment. The video stores with over 50% of their stock in sexually oriented entertainment would be classified as adult entertainment establishments. Zoning only deals with locational issues.

Ms. Etherington asked that the board have an organizational meeting. She also asked that more research be done on the 5 year prohibition on adult entertainment licenses and permits for sexual related felony offenses as it would pertain to case law.

Ms. Etherington asked for additional information regarding sex offender recidivism rates, questioning whether there are higher than other offenders, given that multiple states have such strict registration laws.

This concluded our business and we adjourned at 6:50 pm until the next regularly scheduled meeting of January 11, 2006 at 5:00 pm.

Respectfully submitted,

/s/ Linda J. Borum, SECRETARY

Sec. 18.01. Metropolitan clerk.

There is hereby created and established the office of metropolitan clerk, which shall be charged with the recording and safekeeping of minutes, resolutions and ordinances of the metropolitan council and of all other documents relating to official actions of the metropolitan government. The metropolitan clerk shall also perform such other duties as may be imposed upon him by this Charter or by ordinance. The metropolitan clerk shall act under the supervision and control of the mayor and council.

Any vacancy in the office of metropolitan clerk shall be filled by the appointment of the mayor, subject to the confirmation by the metropolitan council, pursuant to the civil service provisions of this Charter. Such clerk shall have been a resident of the area of the metropolitan government for at least five (5) years preceding the clerk's appointment. The clerk's office shall be a civil service office and compensation shall be fixed in the metropolitan pay plan provided for by article 12. The clerk shall have such clerical help as may be provided by ordinance.

Editor's note – An amendment to the second paragraph of this section, requiring council confirmation of the appointment of the clerk by the mayor, was approved at an election held Aug. 4, 1983

CERTIFICATION

I, Marilyn S. Swing, being the duly appointed Metropolitan Clerk of The Metropolitan Government of Nashville and Davidson County, do hereby certify that the foregoing is a true and exact copy of **18.01** the Charter of

The Metropolitan Government of Nashville and Davidson County, approved in referendum on June 28, 1962, and amended on October 21, 1965; November 8, 1966; August 5, 1971; November 7, 1972; November 5, 1974; November 6, 1976; November 7, 1978; November 4, 1980; August 4, 1983; November 4, 1986; March 8, 1988; August 1, 1991; September 5, 1991; November 3, 1993; November 8, 1994;. November 5, 1996; August 7, 2003; and November 7, 2006.

WITNESS MY HAND and the Seal of The Metropolitan Government of Nashville and Davidson County, Tennessee, this 26th day of February, 2007.

/s/ Marilyn S. Swing
Metropolitan Clerk

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me,
by Marilyn S. Swing this 26th day
of February, 2007.

/s/ Marlene Fuller
Notary Public

My Commission expires: 07/25/09
[SEAL]

IN THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, et al, Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	)	Case No: 3-97-1066 Judge Nixon Magistrate Judge Griffin
– AND –		
JERRY C. PENDERGRASS, et al., Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendants.	)	Case No: 3-97-1176 Judge Nixon Magistrate Judge Griffin

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DEPOSITION OF TERRY COBB
TAKEN WEDNESDAY, OCTOBER 21, 1998

Reported By:
MICHELLE E.C. HINSON
Court Reporter
601 Boyd Mill Avenue, H-2
Franklin, TN 37064
(615) 791-4357

IN THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, et al, Plaintiffs,	)	
v.	)	Case No: 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	)	Judge Nixon Magistrate Judge Griffin
– AND –		
JERRY C. PENDERGRASS, et al., Plaintiffs,	)	
v.	)	Case No: 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendants.	)	Judge Nixon Magistrate Judge Griffin

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DEPOSITION OF MARILYN SWING
TAKEN WEDNESDAY, OCTOBER 21, 1998

Reported By:
MICHELLE E.C. HINSON
Court Reporter
601 Boyd Mill Avenue, H-2
Franklin, TN 37064
(615) 791-4357

IN THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, et al, Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	)	Case No: 3-97-1066 Judge Nixon Magistrate Judge Griffin
– AND –		
JERRY C. PENDERGRASS, et al., Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendants.	)	Case No: 3-97-1176 Judge Nixon Magistrate Judge Griffin

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DEPOSITION OF LON F. WEST
TAKEN WEDNESDAY, OCTOBER 21, 1998

Reported By:
MICHELLE E.C. HINSON
Court Reporter
601 Boyd Mill Avenue, H-2
Franklin, TN 37064
(615) 791-4357

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, et al, Plaintiffs,	)	
vs.	)	NO. 3:97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	)	
– AND –		
JERRY C. PENDERGRASS, et al, Plaintiffs,	)	
vs.	)	No. 3:97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.	)	

DEPOSITION OF DONALD JONES

DATE & TIME: OCTOBER 28, 1998/9:45 A.M.

LOCATION: SECOND FLOOR, METRO COURTHOUSE NASHVILLE, TENNESSEE

REPORTED BY: BEVERLY "BECKY" COLE, RPR, CCR
P. O. BOX 8473
HERMITAGE, TN 37076
(615) 884-0017